No. 15337

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CENTENNIAL INSURANCE COMPANY, a Corporation,
Appellant,

vs.

DAVE SCHNEIDER, Doing Business as DAVE SCHNEIDER WHOLESALE JEWELRY,
Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction.

The basis for the jurisdiction of the District Court of the United States for the Southern District of California, Central Division, to try this case and enter judgment therein, and for the above entitled United States Court of Appeals to review that judgment, is correctly stated in Appellant's Opening Brief, and we adopt that statement as the basis for that jurisdiction.

Statement of the Case.

The defendant's (appellant's) statement of the case is not sufficiently full in order that we may argue points which we feel are important, and, therefore, we desire to augment defendant's statement, and in doing so if we reiterate portions of their statement, it is for the purpose

of conveniently and coherently presenting our statement of the case, without requiring the court to refer back to defendant's statement.

A. Undisputed Facts.

The defendant for a valuable consideration issued to the plaintiff a policy of insurance whereby the defendant insured the plaintiff "against all risks of loss of or damage to" jewelry and other property "arising from any cause whatsoever," occurring within one year from August 15, 1954, subject to exceptions and conditions contained therein [Pltf. Ex. 1—Insurance Policy]. On December 3, 1954, the plaintiff suffered a loss of jewelry and other property worth $25,360.01, and also the loss of sample cases and trays worth $914.50, or a total loss of $26,274.51 [T. R. pp. 43-45; Pltf. Ex. 2, Proof of Loss]. Because the loss occurred from an automobile, the maximum liability of the defendant under the policy could only be $15,914.50 [Pltf. Ex. 1]. The loss has not been paid.

B. Statements, Contentions and Admissions of Defendant in Its Brief and Answer as Constituting a Basis That Jewelry and Cases Were in the Automobile at the Time of Loss.

> "Two cases of jewelry as large and cumbersome as plaintiff's cases do not simply evaporate into thin air. Something must have happened to them and the most logical conclusion is indeed that which the trial court reached, namely, that someone stole them." (Appellant's Op. Br. p. 13.)

> "It is our position that, under clause 5 (I), defendant merely had the burden of proving that the loss occurred while the jewelry was in the automobile." (Appellant's Op. Br. p. 16.)

"That the alleged loss occurred, if it occurred at all, while the said property was in or upon an automobile . . ." [T. R. p. 15, Third Defense in the Answer.]

C. Manner of Carrying Jewelry and Operation of Automobile.

When traveling plaintiff put the cases in rear trunk compartment of his car [T. R. p. 50]. If the lock is disengaged the trunk lid goes up all the way and would block his vision through the rear window, if he was looking [T. R. pp. 60-61]. On the day of the loss plaintiff never saw the back (referring to the lid of the trunk) come up, and the only way he could see it in the rear view mirror if it came up all the way [T. R. pp. 55, 61]. Plaintiff had no trouble with the locking mechanism of the trunk prior to and including December 3rd, the day of the loss [T. R. p. 60]. To plaintiff's knowledge something couldn't just slide out of the trunk compartment as he drove along [T. R. p. 69]. So far as plaintiff knew, no one else had a key to the trunk [T. R. p. 88].

D. Events at Bruce Jewelers.

At Bruce Jewelers plaintiff displayed his merchandise, and while there, put the cases back in the car again, and locked the trunk which locks automatically, and left there about 2:00 P. M. [T. R. pp. 58-59].

E. Events on Trip From Bruce's to Joy Jewelry.

Plaintiff went from Bruce's to Joy Jewelry Company, a distance of about a block and a half, which took him about 15 minutes, and made no stops en route to Joy's [T. R. p. 59], and he didn't know that they were stolen

during that trip [T. R. p. 60]. Plaintiff was in motion the entire time, except for traffic lights, or slowed up, and didn't remember if he stopped [T. R. pp. 61-62]. On this trip plaintiff did not notice the lid go up [T. R. p. 61].

F. Events at Joy's.

Plaintiff testified that he parked his car in front of Joy's, maybe a car space below, and went to the doorway of Joy's but never went completely in [T. R. p. 62], asked for Mr. Stelzer, and was then about 15 feet from the car, and was watching the car, and Stelzer came to the doorway and plaintiff talked to Stelzer there, but did not take his cases out of the car then [T. R. p. 63]. Stelzer and plaintiff got into plaintiff's car, drove around the block and went into a little alleyway at the back of Stelzer's store (Joy's) where Stelzer wanted to show plaintiff a car he had purchased for his wife [T. R. pp. 63-64, 66]. It is a blind alley, wide enough for just about a car [T. R. p. 64]. Plaintiff drove his car immediately in back of Stelzer's Ford car, and thought the cars were bumper to bumper, but could have been a foot away [T. R. p. 66]. Plaintiff got out of his car, locked the two doors, and got into Stelzer's car, and the tail end of plaintiff's car was sitting on the sidewalk [T. R. p. 67]. When plaintiff got into Stelzer's car he was watching his car, having adjusted the rear view mirror of Stelzer's car, so he could see it, and off and on was looking through the rear view mirror, and plaintiff was in Stelzer's car talking to him about 10 to 15 minutes [T. R. pp. 68, 70]. Plaintiff has no way of knowing whether or not the cases were stolen out of his car at that time, and did not check the trunk at that time before he drove away to see whether or not the cases had been taken out [T. R. p. 70].

Stelzer testified that plaintiff never came any further into his place of business than the doorway, and at that time plaintiff's car was in plain sight of Stelzer, and then they went around in plaintiff's car to the back and parked, and got out and looked at the car he purchased for his wife [T. R. p. 109]. As to plaintiff's car when it was parked in the alley, Stelzer said:

> "Q. Was the car in your sight all of the time? A. Yes.
>
> Q. Was there any particular reason that you were observing the car? A. Well, I observed the car because I knew Mr. Schneider was parked really against the law, across the sidewalk. I think he was extending out over the sidewalk and very close to the red zone which starts right at the end of the sidewalk and down." [T. R. p. 110.]

Stelzer also testified that they were there close to five, six or seven minutes [T. R. pp. 110-111] and as follows:

> "Q. Were you in such an area that you feel, if anyone had come there, you would have seen them, aside from you and—A. Yes, I think so.
>
> Q. Did you see anybody? A. No, sir.
>
> Q. Did you hear them? A. No, sir.
>
> Q. Nothing of an unusual nature? A. No, sir." [T. R. p. 111.]

G. Events on Trip From Joy's to California Premium Service.

From Joy's plaintiff went to California Premium Service, and there was quite heavy traffic, and traffic was just letting out from aircraft places, and he would say it took almost 45 minutes, which is very unusual, and left Joy's about 3:45 P.M. [T. R. p. 70]. It was just beginning to

rain, the roads were slick, and it is about 4 miles from Joy's to California Premium Service and it was not a continuous drive from Joy's to California Premium, because he was constantly stopping for traffic [T. R. p. 71]. Plaintiff stopped for traffic lights, however, stopped more in the middle of the block than at any other place, and at times stopped from three to five minutes in this congested traffic, because it took him quite a long time to get over there and it really was a short distance [T. R. p. 97]. He was not really watching the rear trunk lid between Joy's and California Premium Service, but watching the traffic up ahead [T. R. pp. 71-72]. Nothing unusual about the trip from Joy's to California Premium Service except they were riding bumper to bumper [T. R. pp. 72-73, 78]. Between Joy's and California Premium Service did not see the trunk compartment go up at any time [T. R. p. 77]. Plaintiff does not know whether the cases were stolen during that trip [T. R. p. 78].

H. Events at California Premium Service.

Plaintiff parked his car in front of the California Premium Service, so that the rear end of his car was about four or five feet away from the entrance [T. R. p. 79], so that he could see it may be from the doorway, or from any part in the store [T. R. p. 80]. Plaintiff got out of his car when he got there, and it was raining at the time, and went to the doorway, but did not take the cases out [T. R. p. 80]. He stayed at the doorway without going in just long enough to ask for Mr. Nigro, and he came up and talked to plaintiff and plaintiff was facing the car the whole time and was watching it [T. R. p. 81]. There was a man and woman in the store with a diamond and Nigro asked him to look at it, and plain-

tiff said he would, and Nigro said that he would look at plaintiff's car or watch his car for him until he looked at the stone [T. R. pp. 81-82]. When he was examining the diamond he was facing the entranceway, looking kind of a little bit half way [T. R. p. 83]. Was not looking at the car at the time he was looking at the stone, but it didn't take very long [T. R. p. 84]. Looked at the stone not over a minute [T. R. p. 85]. Thereafter he went out to the car and opened up the back and the merchandise was gone [T. R. pp. 86-87], meaning that somehow or other, the merchandise had been lost out of his car [T. R. p. 88]. When plaintiff discovered the loss he went into the California Premium store and asked to use the phone [T. R. pp. 88-89], and whether he called the insurance company before the police, he didn't remember but thought he called his office first, and thought someone else called the Sheriff's Department [T. R. p. 89] and Sheriff's Deputies arrived about 20 minutes later [Pltf. Ex. 2—Proof of Loss].

Mr. Nigro, proprietor of the California Premium Company, testified that he remembered the occasion when plaintiff lost the jewelry [T. R. pp. 121-122], and when plaintiff came to his store there were some people in his store looking at a diamond [T. R. p. 122] and after he had a conversation with plaintiff, plaintiff examined the diamond [T. R. p. 123], and Nigro also testified as follows:

> "Q. Can you tell the court what you were doing while my client was looking at this diamond? A. Yes, I can.
>
> Q. What were you doing? A. I was looking at his car.
>
> Q. At his car. Can you tell us whether or not, during the time that my client was at your place

of business, anybody went into the back end of his car from the time he left to look at the diamond until he went back to the car? A. Yes I can.

Q. Was there anybody? A. No, there couldn't." [T. R. p. 123.]

I. Plaintiff's Testimony as to Watching His Car.

"Q. Following up this bathroom thought, did you go to the bathroom at any time that day, for any purpose, between the time of leaving your place of business at ten o'clock in the morning up until after you discovered these missing cases somewhere around four or five o'clock in the afternoon? A. Just before I left.

Q. And that is the only time you went near a bathroom? A. Yes.

Q. The rest of the time you were either in your car or, as you say, going in and out of the stores but having the car in view; is that correct? A. Yes, sir." [T. R. p. 71.]

"Q. Do you know whether or not the cases were stolen during the trip from Joy's to the California Premium Service? A. That is the only place it could have been stolen, because I was watching it all the other time." [T. R. p. 72.]

J. Inventory.

Plaintiff immediately gave a copy of the inventory to the police, and while that was not an inventory of the stuff he had, it was an inventory of what the salesman had [T. R. p. 91] and he gave them that inventory for the similarity, because they use the same samples for each line, and when they pick out lines for salesmen, they

pick exactly the same thing right down the line [T. R. pp. 91-92].

Plaintiff testified as follows:

"Q. (By Mr. Hauerken): Did you have an inventory that morning, December 3, 1954, of the merchandise in your possession and in the cases in the trunk of your car, that you state was lost on December 3rd? A. I have an inventory all of the time of everything in the place, including what I have in my car and what I have in the salesman's car." [T. R. p. 91.]

"Q. That was the inventory in being on December 3, 1954, of merchandise in your car, which you state was lost that day? A. Well, there actually was a list, but I couldn't find it in the confusion we had between Pinkerton and Mr. Sully, and quite a few of the others were in and out of that office. It was a question—somebody got it, I don't know who did. This particular one, to the best of my knowledge, was as close and accurate as I could give at the time." [T. R. p. 92.]

"Q. There was no inventory in being on December 3, 1954, that you ever produce and submitted to the Centennial Insurance Company; isn't that correct? A. There was one, but as I said before, I could not find it. However, the way to take a real, true picture of it is to take all the sample lines, which I did, and put them all into stock, and sat down with the girls and the fellows in the office and the shop, and we worked around the clock to get it out for the Police Department and for you." [T. R. p. 94.]

On March 17, 1955, the following stipulation was entered into with defendant's counsel, as shown on page 5 of Defendant's Exhibit B, being insurance statement under oath on March 17, 1955, and this was one year prior to the trial on March 26-27, 1956:

> "Mr. Hauerken: I will enter into this stipulation with you, Mr. Hengel. In the event I see fit to request the books and records, that you and I have a stipulation that I may, if I see fit to employ an accountant to go in and review the books and records and take such photostatic copies as I see fit, and I will make that determination within 30 days after this examination under oath is transcribed and signed.
>
> Mr. Hengel: May we add this: Not only would you make that determination, but you will make such copies of the inspection within that 30 days.
>
> Mr. Hauerken: It may not be humanly or physically possible to do that, however, we will start it and proceed as diligently as possible.
>
> Mr. Hengel: Let's put a stop-gap of 30 days, and if you need more time then we can stipulate to that, possibly, later." [Deft. Ex. B, p. 5—insurance statement under oath of Dave Schneider, taken on March 17, 1955.]

The plaintiff also testified under redirect examination as follows:

> "Q. It is simply this: Whether you actually designate whatever list you had in your establishment as an inventory or whatever you call it—names, I claim, are not important—did you have data there from which the amount of your loss and what you lost could be ascertained?
>
> Mr. Hauerken: May I note the same objection, your Honor?

The Court: Yes. It is overruled.

Q. (By Mr. Ely): Did you have it? A. Yes.

Q. And did you show it to the representatives of the company? A. They sent a man over.

Q. Do you remember his name? A. No, sir. It was a gentleman they sent over to check my file.

Q. To check your books? A. Yes." [T. R. p. 105—Redirect Examination.]

The plaintiff under direct examination, gave substantially the same testimony [T. R. p. 45] and also said:

"Q. And was that examination made? A. Yes, sir; it was." [T. R. p. 45.]

The following statement was made by plaintiff in insurance statement under oath, taken on March 17, 1955 [Deft. Ex. B] and read into the record:

" 'The second inventory referred to is the one attached to my proof of loss made January 20, 1955, which was prepared in connection with said proof of loss and shortly before the filing of said proof of loss with said insurance company, and this second inventory is a correct inventory of said loss that occurred on December 3, 1954, and was prepared by checking my books, records, and merchandise." [T. R. pp. 93-94.]

Summary of the Argument.

1. Federal Rules of Civil Procedure, 28 U. S. C. A., Rule 52(a) provide that findings of fact shall not be set aside unless clearly erroneous. The findings of fact are not erroneous, and therefore the conclusions of law were proper, and the judgment that was made and entered thereon should be affirmed.

2. That plaintiff's *prima facie* case was established when he proved that his loss came under the following provision of the policy: "5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever . . ."

3. That Clause (I) in the policy (automobile exception), as a whole is an exception, and that the defendant has the burden of proving that it comes within the whole thereof, including that plaintiff was *not* in or upon the automobile at the time the loss occurred. That the defendant also has the burden of proof as to any other exception.

4. That the automobile exception should be strictly construed against the insurer and liberally in favor of the insured, especially since the following portion thereof is ambiguous, to-wit: "Loss or damage to property insured hereunder while in or upon any automobile . . ."

5. The evidence is sufficient to sustain the finding of the court that the plaintiff was in the automobile at the time it was stolen therefrom, regardless of who has the burden of proof, and assuming the plaintiff has that burden, he has sustained the same.

6. Defendant has not sustained the burden of proof as to the following exception, pertinent part of which is: ". . . (M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory." Loss was discovered when plaintiff opened trunk of his car, not on taking inventory.

7. That plaintiff maintained the kind of inventory, books and records required by the policy, and defendant makes no claim that it could not determine the loss therefrom, nor that plaintiff did not suffer the loss.

ARGUMENT.

All emphasis supplied in this brief is ours, except as otherwise specifically designated.

A. Findings of Fact Shall Not Be Set Aside Unless Clearly Erroneous.

Federal Rules of Civil Procedure, 28 U. S. C. A., Rule 52(a), sets forth the rule with reference to setting aside findings of fact by the reviewing court, and we quote the pertinent portion of that rule as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

This rule has been applied in many cases to sustain judgments of the trial court. In the case of *Martin v. Be-Ge Mfg. Co. of Gilroy* (9th Cir., 1956, Cal.), 232 F. 2d 530, at page 532, the court said:

> "This court may not upset a finding of fact of the District Court 'unless clearly erroneous,' Fed. Rules Civ. Proc. rule 52, 28 U. S. C. A.; Graver Tank & Mfg. Co. v. Linde Air Products Co., 1950, 339 U. S. 605, 609-610, 70 S. Ct. 854, 94 L. Ed. 1097; Patterson-Ballagh Corp. v. Moss, 9 Cir., 1953, 201 F. 2d 403, 407; Refrigeration Engineering v. York Corp., 9 Cir., 168 F. 2d 896, 899, certiorari denied, 1948, 335 U. S. 859, 69 S. Ct. 133, 93 L. Ed. 406; Maulsby v. Conzevoy, 9 Cir., 161 F. 2d 165, 167, certiorari denied 1947, 332 U. S. 791, 68 S. Ct. 99, 92 L. Ed. 373; and here there is ample evidence to sustain the finding of non-infringement."

In the case of *Glens Falls Indemnity Company v. United States* (9th Cir., 1956, Cal.), 229 F. 2d 370, at page 373, the court said:

> "In most instances the points urged either involve only questions of fact or are based on assertions of fact contrary to the findings of the trial court. It is not the function of this court to *retry cases on appeal.* Findings of fact by the trial court are *presumptively correct* and will not be set aside unless clearly erroneous. F. R. Civ. P. Rule 52(a) 28 U. S. C. A."

The following case likewise applies the foregoing rule:

> *United States v. Fotopulos, et al.* (9th Cir., 1950, Cal.), 180 F. 2d 631, 634.

B. Plaintiff's Prima Facie Case.

The plaintiff contends that he has proved his *prima facie* case when he proved the facts as set forth under the foregoing title "Undisputed Facts," being briefly the existence of the contract of insurance between the parties containing the following all-risk insuring agreement: "5. This policy insures against *all risks of loss* of or damage to the above described property *arising from any cause whatsoever* . . ."; the loss of the property, and the non-payment for that loss.

Under that all-risk insuring agreement we are not called upon to prove the loss occurred because of theft, fire, accident, or any other cause. That particular all-risk insuring agreement is clear and definite, as it most certainly covers *all risks* and *any cause whatsoever.* If defendant wanted to only insure against loss from a particular cause it would have been easy for it to have so

provided, as they prepared the contract, but they chose to insure loss from any cause, thereby making a more attractive policy of insurance to sell to the public, and making it more attractive for the plaintiff to buy.

C. Clause (I), (the Automobile Exception), as a Whole Is an Exception. Plaintiff's Interpretation Erroneous, and Their Argument as to Burden of Proof Also Erroneous.

For easy identification of Clause (I), we will designate it as the *automobile exception.*

The word "except" follows the last word "whatsoever" in the foregoing all-risk insuring agreement, and following the word "except" are 12 exceptions, being (A) to (M), inclusive, including the automobile exception. Defendant's argument revolves principally around the automobile exception, which is as follows:

> "(I) *Loss* or damage to property *insured hereunder* while in or upon any automobile, motorcycle or any other vehicle unless, at the time the loss occurs, there is actually in or upon such vehicle, the Assured or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle. *This exclusion* shall not apply to property in the custody of a carrier mentioned in Section 2 hereof, or in the custody of the Post Office Department as first class registered mail."

It seems as though defendant in its brief is assuming the position that the whole of that exclusionary clause is not an exception.

Later in our brief we are going to take up at greater length the question of the rules and law relating to construction and interpretation of an insurance contract be-

tween plaintiff and defendant, but at this point in our brief we will merely make brief mention of some of them in order to point up our argument in opposition to the position they are taking with reference to the automobile question.

The defendant in its brief bottom of page 16 and top of page 17, concedes:

> "We recognize that, in a policy of this type, the burden of proving that a loss is excluded rests upon the insurance company."

But in fact they want to assume *only* the burden as to *part* of the exclusionary clause when they contend:

> "Thus, since the policy in this case excluded losses occurring while the jewelry was in an automobile, the burden was on defendant to establish (by its testimony or by that of plaintiff) that the loss occurred while the jewelry was in an automobile. In order to recover despite that fact, it was then up to plaintiff to establish that he was *actually* (emphasis theirs) in or upon the automobile at the time of the loss. It is *only* (emphasis their's) in such a case that he could bring himself back within the coverage of the policy. The burden was upon him (it could be on no one else) to prove that his loss came within the exception to the already established exclusion." (Appellant's Op. Br. pp. 16-17.)

Their argument that they only have the burden of proving that the jewelry was in the automobile at the time of loss, and that we have the burden of proving that plaintiff was actually in or upon the automobile, is contrary to their own concession that the *burden of proving a loss is excluded rests upon them* (Appellant's Op. Br.,

bottom p. 16, and top p. 17). It also violates the rule that a contract is to be construed as a whole, and especially violates the construction of an exclusionary clause as a whole. In other words they are not reading and interpreting the automobile exception as a whole, but isolating parts of it, and assuming the burden of only one part, and attempting to shift the burden of the other part to the plaintiff, and this is clearly evident when they say that plaintiff has the burden "to prove that his loss came *within the exception* to the already *established exclusion.*" They submit the novel innovation that plaintiff has the burden of proving an *exception to an exception,* and we can find no basis for it. There is only one exception when you read the clause together, and the burden of proving that exception and the whole thereof rests on them. Their argument also violates the rule that exceptions in an insurance policy must be strictly construed against the insurer and liberally in favor of the insured. Their argument also violates the plain reading of the contract when you read the exception with the all-risk insuring agreement, as the insuring agreement, in effect, provides protection against *all risks of loss from any cause,* and that includes loss from an automobile, and no matter who proves that the loss was from the automobile, the insurance company still has the burden of proving that plaintiff was not in or upon the automobile at the time—in other words the insurance company has the burden as to the whole of the exception, not part of it, as the insuring clause is an all-risk agreement, except for the exclusion. Despite the plain reading of that all-risk

insuring clause they say to plaintiff you cannot recover because we proved the jewelry was in the car, and unless you can now prove that you were in it also at the time, your policy does not cover your loss.

They wrote the contract, and if they didn't want to insure jewelry in an automobile, they could have so provided by merely having the exception read: "Loss or damage to property insured hereunder while in or upon any automobile" and stopped there, but they chose not to make the exception that strict, but made the more attractive exception that they did, and by so doing, they made the policy more attractive for plaintiff to buy.

What the defendant is attempting to do by its method of construction, is to create a "condition precedent" out of the automobile exception clause, but notwithstanding that attempt, it still remains an exclusionary clause, and if they wanted to create a "condition precedent" they should have done so in unequivocal terms. Pertinent to this point is the case of *Ransom v. Penn Mutual Life Ins. Co.* (Cal., 1954), 43 Cal. 2d 420, 425, 274 P. 2d 633, which states as follows:

Page 425 of Cal. Report:

> "There is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be unconscionable to permit the company, after using language to induce payment of the premium at that time, to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer. Moreover, defendant drafted the clause and had it

> wished to make clear that its satisfaction was a condition precedent to a contract, it could easily have done so by using unequivocal terms. While some of the language tends to support the company's position, it does no more than produce an ambiguity, and the ambiguity must be resolved against defendant. (Civ. Code, §1654; see cases collected in 14 Cal. Jur. 443-446.)"

There can be no doubt but that the whole of the automobile exception, is in fact an exception and an exclusionary clause. First, they use the word "except" right after the all-risk clause and before the beginning of detailed specification of exceptions. *Secondly,* right in the clause itself is the provision: "*This exclusion* shall not apply to property in the custody of a carrier . . ." Thus, the language in the policy itself describes the automobile exception as an *exception* and *exclusion.*

If the automobile exception, as a whole, is not an exception, then the other eleven exceptions are subject to the same qualification. If the automobile exception can be partitioned, and parts thereof isolated, and when so isolated, construed and interpreted separately from the rest of the exception, or from the rest of the contract, and thereafter assign the burden of proof to the parties as to the isolated parts, then in like manner the other 11 exceptions are subject to the same treatment. Would it be reasonable for defendant to claim that the other exceptions should be similarly treated? We feel they have erroneously construed and interpreted Clause (I) and their statement as to the burden of proof relating to this clause is likewise erroneous.

D. Statutory Rules Relating to Construction of Contracts.

Since this is a California contract, the laws of California govern its interpretation and construction, and the following statutes are therefore applicable.

The following are sections from the *Civil Code of California:*

Civil Code, Section 1641:

> "The whole of a contract is to be taken together. so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Civil Code, Section 1643:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties:

Civil Code, Section 1644:

> "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

Civil Code, Section 1649:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

Civil Code, Section 1654:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be

interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

E. Ambiguity in Exception (I), Automobile Exception.

"Words and Phrases," Permanent Edition, Volume 3, page 440, is authority for the definition of "ambiguous" as follows:

> "The word 'ambiguous' means capable of being understood in more senses than one; obscure in meaning through indefiniteness of expression; having a double meaning; doubtful and uncertain; meaning unascertainable within the four corners of the instrument; open to construction; reasonably susceptible of different constructions; uncertain because susceptible of more than one meaning; and synonyms are 'doubtful,' 'equivocal,' 'indefinite,' 'indeterminate,' 'indistinct,' 'uncertain,' and 'unsettled.' "

In *"Words and Phrases," Permanent Edition, Volume 3, page 437,* "ambiguity" is similarly defined.

The automobile exception is ambiguous. It says "loss or damage to property while in or upon an automobile . . ." It says "loss *to property*"; it does not say "loss *to the owner.*" How can "loss to property" mean anything other than "damage to property?" There cannot be theft *to* property. There can be theft *of* property. There could be loss *to* the owner, perhaps, in a technical sense, by a theft. But the exception does not even say that. How could an ordinary layman interpret

"loss or damage *to property*" to mean *"theft from an automobile."*

In *"Words and Phrases," Permanent Edition, Volume 25 page 611,* under sub-title of "Damage synonymous" to the general title of "Loss," numerous cases are given holding that "loss" and "damage" are synonymous. So when applying the rule of strict construction against the insurer, which rule is hereafter argued at more length, the term in defendants policy "loss to property" should be held to mean "damage to property." In *"Words and Phrases,"* in said *Volume 25 and page 611,* is found the case of *Littrell v. Allemannia Fire Ins. Co. of Pittsburgh, Pa.* (N. Y., 1928), 226 N. Y. Supp. 243, 244, 222 App. Div. 302, and the court at page 244 of 226 N. Y. Supp. said: "The word 'loss' implies that the property is no longer in existence, whereas the word 'damage' implies that it still exists although in damaged form." In other words "loss to property" could only be held to mean complete destruction, under the rule of strict construction against the insurance company.

The automobile exception is also ambiguous because it says "loss" while in an automobile. Nothing could be lost while at the same time being in or upon an automobile.

Because of the ambiguity in this exception, we come to the conclusion that this particular exception can apply *only to damage to property.* Jewelry or any other article which is insured under this policy can suffer damage, either in whole or in part, while in or upon an automobile; but it cannot be lost, in any common sense viewpoint, if it is in or upon an automobile. If they wanted to exclude "theft from" the automobile, they could have easily said

so. They cannot inject something in the automobile exception that is not there, and "theft from" or "lost from" an automobile is not in there, and therefore they cannot claim that there is an exception as to property "stolen from" or "lost from" the automobile.

The use of the preposition "to" in the automobile exception, speaking of "loss or damage *to* property while in or upon an automobile" excludes, by every reasonable rule of construction and common sense, the intent that theft *of* the property could be included within such exclusion.

F. Words of a Contract Are to Be Understood in Their Ordinary and Popular Sense.

In the case of *New York Life Ins. Co. v. Hiatt* (9th Cir., 1944, Cal.), 140 F. 2d 752, this court at page 753 said:

> "Speaking of an ambiguity imported into a policy by a similarly stamped provision relating to incontestability, a California appellate court observed in a recent decision that the applicable measure of understanding is not that of one engaged in the insurance business or trained in the law. 'The proper test,' said the court, 'is what the drafter of the instrument might reasonably anticipate to be the effect upon an untrained mind for it is to that class that the instrument is designed to be offered."

The *Civil Code of California,* Section 1644, which we have heretofore quoted, provides in part as follows: *"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning;* . . ." This rule is applicable to insur-

ance contracts. In the case of *Hyer v. Inter-Insurance Exchange, etc.* (Cal., 1926), 77 Cal. App. 343, 347, 246 Pac. 1055, *the Court at page 347 of the California Report said:* "The terms used in an insurance policy should be given their plain, ordinary, and popular meaning." And in the case of *Wilmarth v. Pacific Mutual Life Ins. Co.* (Cal., 1914), 168 Cal. 536, 546, 143 Pac. 780; Ann. Case 1915B, 1120, *the Court at page 546 of the California Report said:* "Whatever the terms 'passenger elevator' and 'freight elevator' may mean technically to those engaged in the manufacture of lifts, these expressions in a policy of insurance are to be construed in their ordinary and popular sense."

G. Exceptions in an Insurance Policy Must Be Strictly Construed Against the Insurer and Liberally in Favor of the Insured.

Exceptions in insurance policies are strictly construed against the insurer and liberally in favor of the insured, and this rule is definitely announced in the case of *Pacific Heating and Ventilating Co. v. Williamsburg City Fire Insur. Co., etc.* (Cal., 1910), 158 Cal. 367, 369-370, 111 Pac. 4, and we quote therefrom as follows:

Pages 369-370 of Cal. Report:

> "A policy of insurance is but a contract, and like all other contracts it must be construed according to the language and terms used therein in order to arrive at its true sense and meaning. Courts will not undertake to relieve parties from the express and plain stipulations into which they have entered. But while this is true, it is also a rule well established by the courts, that provisos and exceptions contained in a policy of insurance must be strictly construed against the insurer and liberally in favor

of the insured. This rule is based upon the fact that the contract of insurance is drawn by the insurer, and in it are usually placed many exceptions, conditions and forfeitures deliberately and purposely by the insurer so as to avoid liability, and the ordinary person in paying a premium and accepting a policy does not read, or, if he does read, he cannot understand the many conditions, exemptions and exceptions contained therein. In fact such provisions, exceptions and conditions in many cases, on account of their ambiguity, have been construed differently by the most eminent lawyers and the highest courts of the land. Therefore the courts endeavor to carry out the contracts as made by the parties and, at the same time, prevent if possible the exceptions and conditions from wholly devouring the policy. It is therefore a fundamental rule that the insurer is in duty bound to use such language as to make the conditions, exceptions and provisions of the policy clear to the ordinary mind, and in case it fails to do so, any ambiguity or reasonable doubt must be resolved in favor of the insured and against the insurer."

The case of *Narver v. California State Life Ins. Co.* (Cal., 1930), 211 Cal. 176, 180-181, 294 Pac. 393, 71 A. L. R. 1374, likewise states the rule as follows:

Pages 180-181 of Cal. Report:

" 'It is a well-recognized rule of law that of any uncertainties or ambiguities appear in an insurance policy which may be solved by either one of two reasonable constructions, the one which is most favorable to the insured and which will give life, force and effect to the policy should be adopted. The insurance company having prepared the policy and all documents used in connection with its issuance,

should not be heard to put such a construction upon an ambiguity, caused by it, as will defeat the policy and take from the beneficiary the very purpose and object of the insurance, if a reasonable construction upholding the insurance can be had that does no violence to the language used and the clear intention of the parties. (Pacific Heating & Ventilating Co. v. Williamsburg etc. Co., 158 Cal. 367 (111 Pac. 4); Welsh v. British American Assur. Co., 148 Cal. 223 (113 Am. St. Rep. 223, 7 Ann. Cas. 396, 82 Pac. 964); Witherow v. United American Ins. Co., 101 Cal. App. 334 (281 Pac. 668).) With this rule in mind, we will proceed to a consideration of the contract of insurance involved in this appeal.' "

You will notice that the case of *Pacific Heating & Ventilating Co. v. Williamsburg City Fire Insur. Co., etc., supra,* is cited as authority for the foregoing rule.

In the case of *Pistolesi v. Massachusetts Mut. Life Ins. Co.* (D. C. N. D., Cal., S. D., 1945), 64 Fed. Supp. 427, *the court at page 430 said:* "The California law being controlling here, I find the decisions of the Supreme Court of that State, without exception, holding to this liberal rule." And *at page 430* of the *Pistolesi* case, *supra,* quotes verbatim the rule that we have heretofore quoted from the case of *Narver v. California State Life Ins. Co., supra.*

To like effect is the recent case of *Ritchie v. Anchor Casualty Co.* (Cal., Aug. 1955), 135 Cal. App. 2d 245, 258, 286 P. 2d 1000, which states:

Page 258 of Cal. Report:

"If the insurer would create an exception to the general import of the principal coverage clauses, the burden rests upon it to phrase that exception in clear

and unmistakable language. (Pendell v. Westland Life Ins. Co., *supra,* at p. 770.) If this is not done any ambiguity or uncertainty is resolved in favor of the policyholder. Indeed an exception must be couched in terms which are clear to the ordinary mind (Pendell v. Westland Life Ins. Co., *supra,* at p. 770) or any doubts as to meaning will be resolved against the insurer."

If the proviso of an insurance contract is susceptible to two constructions, it is to be construed liberally in favor of the insured and strictly as against the insurer, and we quote from the case of *Mah See v. North American Acc. Ins. Co.* (Cal., 1923), 190 Cal. 421, 424-425, 213 Pac. 42, 26 A. L. R. 123, as follows:

Pages 424-425 of Cal. Report:

"But if it be conceded that the language of the proviso is susceptible to the construction contended for by the defendant, it must also be conceded that it is likewise susceptible to the construction here adopted, and we are thus confronted by an uncertainty or ambiguity, which it is our duty to construe liberally in favor of the insured and strictly as against the insurer. This for two reasons: (1) Because it is found in a policy of insurance (Civ. Code, sec. 1654; Maryland Casualty Co. v. Industrial Acc. Com., 178 Cal. 491, 494 (173 Pac. 993); Wells Fargo & Co. v. Pacific Ins. Co., 44 Cal. 397); and (2) because the language in question is found in an exception, attached to the policy, which purports to limit the risk assumed by the insurer in the general provisions thereof. (Berliner v. Travelers' Ins. Co., 121 Cal. 458 (66 Am. St. Rep. 49, 41 L. R. A. 467, 53 Pac. 918).)"

To like effect as the *Mah See v. North American Acc. Ins. Co., supra,* the case of *Bayley v. Employers' Liability Assurance Corp.* (Cal., 1899), 125 Cal. 345, 352, 58 Pac. 7, states:

Page 352 of Cal. Report:

> " 'Where the language of a policy may be understood in more senses than one, it is to be construed most strongly against the insurer, because he frames it and is supposed to make it as potent as possible in his own favor; but, where there is no imperfection or ambiguity in the language, it must be construed like any other contract, according to the intention of the parties.' (Rankin v. Amazon Ins. Co., 89 Cal. 203; 23 Am. St. Rep. 460.) 'It is a general rule that when a stipulation or exception to a policy of insurance emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured; and when underwriters have left design doubtful by using obscure language, the construction to be adopted is the one most unfavorable to them.' (Merrick v. Germania Ins. Co., 54 Pa. St. 277.)"

Now, then, if the automobile exception in the instant case is subject to two interpretations, the one placed upon it by the defendant that all they have to do is show that the jewelry was in the automobile at the time it was lost in order to avoid liability, unless the plaintiff can bring himself back under the policy by sustaining the burden of proof that he was in or upon the automobile at the time; or the other interpretation of the plaintiff that the phrase "loss or damage to property insured hereunder while in or upon any automobile . . ." means only

damage to property, and that defendant has the burden of proof as to that, then the construction favoring the plaintiff should be applied, as was done in *Mah See v. North American Acc. Ins. Co., supra,* especially since the automobile exception is ambiguous.

The rules laid down in the foregoing cases of *Pacific Heating & Ventilating Co. v. Williamsburg City Fire Ins. Co., supra,* and *Mah See v. North American Acc. Ins. Co., supra,* were reiterated and applied in the recent case of *Arenson v. National Automobile and Casualty Ins. Co.* (Cal., Aug. 1955), 45 Cal. 2d 81, 83, 286 P. 2d 816, as follows:

Page 83 of Cal. Report:

> "It is also the rule that exceptions and exclusions are construed strictly against the insurer and liberally in favor of the insured. (Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 424-425 (213 P. 42, 26 A. L. R. 123); Pacific Heating & Ventilating Co. v. Williamsburg City Fire Ins. Co., 158 Cal. 367, 369-370 (111 P. 4).)"

In the case of *Kautz v. Zurich General Acc. & Liab. Ins. Co.* (Cal., 1931), 212 Cal. 576, 300 Pac. 34, at pages 580-581 *of that case in the California Report,* the court reaffirms the rule laid down in, and at considerable length quotes from, the foregoing case of *Pacific Heating & Ventilating Co. v. Williamsburg City Fire Insur. Co., supra.*

In the very recent case of *Ensign v. Pacific Mut. Life Ins. Co.,* 47 A. C. A. 887, 891, decided in February, 1957 (the bound volume has not yet been printed), the court

restated and applied general rules governing the construction of ambiguous clauses in insurance contracts, when it said:

Page 891:

> "As recently stated by this court, the following general rules govern the construction of ambiguous clauses in insurance contracts: 'It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. (Citations.) If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. (Citations.) If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against (citations), the amount of liability (citations) or the person or persons protected (citations), the language will be understood in its most inclusive sense, for the benefit of the insured.' (Continental Cas. Co. v. Phoenix Const. Co. (1956), 46 Cal. 2d 423, 437-438 (296 P. 2d 801).)"

The foregoing rules of construction and interpretation are also supported by the following cases:

Olson v. Standard Marine Ins. Co. (Cal., 1952), 109 Cal. App. 2d 130, 135-136, 240 P. 2d 379;

Haerens v. Commercial Casualty Ins. Co. (Cal., 1955), 130 Cal. App. 2d Supp. 892, 894, 279 P. 2d 211.

H. The Whole of a Contract Is to Be Taken Together.

The *Civil Code of California,* Section 1641, which we have heretofore quoted, provides:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each cluase helping to interpret the other."

This rule has been applied in the Federal Court, and more especially by this court in the foregoing case of *New York Life Ins. Co. v. Hiatt* (9th Cir., 1944, Cal.), 140 F. 2d 752, *supra,* and at pages 752-753 said:

> "The rules applied in the construction of insurance contracts are well understood. Like any contract, the policy is to be read as a whole, and if possible the several parts should be reconciled and given effect. 14 Cal. Jr. 440, section 22. Because contracts of insurance are not the result of negotiation and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured. Blackburn v. Home Life Ins. Co., 19 Cal. 2d 226, 120 P. 2d 31; Glickman v. New York Life Ins. Co., 16 Cal. 2d 626, 107 P. 2d 252, 131 A. L. R. 1292."

In the foregoing case of *Mah See v. North American Acc. Ins. Co.* (Cal., 1923), 190 Cal. 421, 213 Pac. 42, 26 A. L. R. 123, *supra,* at page 424 of the *California Report,* the court applied to an insurance policy the rule set forth in *Civil Code of California,* Section 1641, *supra,* and the court quoted thereat the whole of said section.

Under the foregoing rule the whole of the insurance contract must be read together. In other words, they cannot isolate a part of the automobile exception, as they

attempt to do by saying all they have to prove is that the jewelry was in the automobile at the time of loss; and then isolate another part of that same exception, and say that we have to prove that plaintiff was in the automobile at the time. The automobile exception is to be taken as a whole, and since the automobile exception is in part ambiguous, and being ambiguous should be construed favorably to the plaintiff to mean "damage to the property" while in or upon an automobile while the plaintiff is in and upon the same, therefore, they have the burden of proving the whole of the exception including that plaintiff was in or upon the automobile at the time. Also, under that rule that the whole of the automobile exception is to be taken together, the whole of that exception is to be construed as an exception, and such being the case the defendant has the burden as to the whole thereof.

I. The Automobile Exception in the Ruvelson Case, Upon Which Defendant Relies Is Materially Different Than the One in the Instant Case.

On the question of ambiguity, at this point we want to discuss the case of *Ruvelson, Inc. v. Saint Paul Fire & Marine Ins. Co.,* 235 Minn. 243, 50 N. W. 2d 629, upon which the defendants rely so much, so much so that they have made it the subject of the Appendix to their brief. While they do not argue the question of ambiguity with this case in mind, we feel it important to differentiate between the automobile exception in that case and the one in the instant case.

At page 14 of *Appellant's Opening Brief,* they say:

> "The leading case on the subject is *Ruvelson v. St. Paul Fire & Marine Ins. Co.,* 235 Minn. 243, 50

> N. W. 2d 629, decided in 1951 by the Supreme Court of Minnesota. The policy involved in that case insured the property of a wholesale jeweler against loss or damage 'arising from any cause whatso ever.' *It also contained an exclusion clause which, except for one immaterial difference in spelling, was word for word the same as clause 5(I).*"

It is not word for word the same and the difference is very material, as we will point out. We quote the exception in the *Ruvelson v. St. Paul Fire & Marine Ins. Co.*, 235 Minn. 243, 50 N. W. 2d 629, *supra,* from page 630 of the *Northwestern Reporter,* as follows:

> "Plaintiffs are engaged in the business of selling jewelry and diamonds to dealers. On October 8, 1949, defendant issued a policy of insurance to plaintiffs under which it insured plaintiffs for a period of one year against 'loss of and/or damage to the above described property' (which included the property here involved) or any part thereof arising from any cause whatsover except as hereinafter mentioned, viz:
>
> "Thereafter follow 12 separate exceptions, including paragraph (I), which is involved in this appeal. Paragraph (I) reads: '*Loss* OF *or damage to property insured hereunder whilst in or upon any automobile, motorcycle or any other vehicle* unless, at the time the loss occurs, there is actually in or upon such vehicle, the assured or a permanent employee of the assured, or a person whose sole duty it is to attend the vehicle; * * *' ". (Emphasis supplied by the Court.)

You will notice in the foregoing quoted exception it definitely provided "Loss *of* or damage to property," but in the instant case we have "Loss or damage to property." The material difference is the presence of the word "of"

in one, and the absence of that word in the other. "Loss *of* property" is readily understandable. Thus, when considering our argument on the question of ambiguity, we claim that the two exceptions are materially different. And may we point out that the insurance company in the *Ruvelson* case, *supra,* easily made that part of the exception clear by the usage of the word *of* in the right place, and the defendant in the instant case could have done likewise, if it wanted to.

J. Burden of Proof.

Applying the rules of construction heretofore discussed, we contend that the automobile exception as a whole is an exception, and that the defendant has the burden of proving that defendant comes within the exception in its entirety, including the provision requiring the plaintiff to be in or upon the automobile, as this is as integral a part of the whole exception as any other part.

Particularly apropos is the case of *Bebbington v. California Western States Life Ins. Co.* (Cal., 1947), 30 Cal. 2d 157, 159, 162, 180 P. 2d 673, and we quote therefrom as follows:

Page 159 of Cal. Report:

> "One issue is determinative of the appeal. Attached to the policy was a rider providing that in the event of the death of the insured as a result of airplane travel other than as a fare-paying passenger in licensed aircraft flying a regular scheduled passenger flight, the liability of defendant should be limited to the reserve of the policy. Defendant, by answer, asserted that the proofs of death submitted by plaintiff showed that the assured died in an airplane accident while flying a United States Army

plane, thus making operative in defendant's favor the limitation of liability contained in the exclusion clause of the rider.

"The burden of proof was on defendant to establish this defense and show the circumstances which brought the death within the exclusion clause. (Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 425 (213 P. 42, 26 A. L. R. 123); Rossini v. Saint Paul Fire etc. Co., 182 Cal. 415 (188 P. 564); Postler v. Travelers Ins. Co., 173 Cal. 1 (158 P. 1022); Witherow v. United Am. Ins. Co., 101 Cal. App. 334, 336 (281 P. 668); Mattson v. Maryland Casualty Co., 100 Cal. App. 96, 98 (279 P. 1045).) Failure of proof on this issue requires affirmance of the judgment for plaintiff. Defendant was able to show that the deceased was killed in an airplane crash, but failed to show that he was not riding as a passenger in a licensed passenger aircraft at the time."

Page 162 of Cal. Report:

"Moreover, it will be noted that even if the excluded documents had been admitted in evidence, there is no statement in any of them to the effect that the son was not a passenger in a licensed plane at the time of his death. In short, defendant simply failed to prove the essential fact which would make operative the exclusion clause of the rider."

You will notice that in that case the defendant was able to show that deceased was in the airplane crash, but defendant failed to show deceased was *not* riding as a passenger.

In the instant case it was proved that the jewelry was in the automobile when stolen, but the defendant failed to show that plaintiff was *not* in the automobile when the

jewelry was stolen. We believe that defendant concedes that the jewelry was stolen from the automobile.

The automobile exception constitutes the basis for the Third Defense in their answer [T. R. pp. 14-15], which is an affirmative defense, and in that defense, the defendant in substance alleged that the plaintiff was not in the automobile at the time, and therefore the issues were drawn on that theory, and thus they also had the burden of proving that affirmative defense.

At page 18 of Appellant's Opening Brief, they cite and quote from the case of *Rossini v. St. Paul Fire, etc. Ins. Co.,* 182 Cal. 415, 188 Pac. 564, as supporting their contention with reference to burden of proof, but you will notice that in the *Bebbington v. Cal. Western Etc. Ins. Co.,* case, *supra,* the court uses the *Rossini* case to support the rule that the burden was on the defendant insurance company. As a matter of fact the *Rossini* case definitely states:

> "In other words, the company must plead and prove the exception or breach which it sets up as defeating plaintiff's *prima facie* right of recovery." (182 Cal., p. 420.)

The following cases are to the same effect:

Page 617 of Cal. Report:

> "Moreover, after the plaintiff had proved damage within the terms of the policy, the burden rested with the defendant to show that such loss was produced through some excepted cause. 'Where proof is made of a loss apparently within a policy, the burden is on the insurer to prove that the loss occurred from a cause for which it is not liable.' "

Carr v. International Indemnity Company (Cal., 1922), 58 Cal. App. 614, 617, 209 Pac. 83.

Page 137 of Cal. Report:

"These matters were pleaded as affirmative defenses and the burden of proof therefore was upon appellant, both as to the concealments and as to the materiality thereof."

Olson v. Standard Marine Ins. Co., supra (Cal., 1952), 109 Cal. App. 2d 130, 137, 240 P. 2d 379.

Page 425 of Cal. Report:

"In considering the claimed insufficiency of the evidence to sustain this finding it is to be remembered that the burden rested upon the defendant to prove by a preponderance of the evidence that facts necessary to bring the case within the purview of the exception to the policy."

Mah See v. North American Acc. Ins. Co., supra, (Cal., 1923), 190 Cal. 421, 425, 213 Pac. 42, 26 A. L. R. 123.

In the case of *Lumbermen's Mut. Casualty Co. v. McIver* (D. C., S. D. Cal., Cen. Div., 1939), 27 Fed. Supp. 702, 703-704, affirmed in 110 F. 2d 323 (1940), the court said:

Page 704 of 27 Fed. Supp.:

"It is apparent therefore that insurer's contention that an unlicensed minor was operating the vehicle in violation of the state law and within the meaning of the exclusionary clause constitutes a special defense."

Page 704 of 27 Fed. Supp.:

"It is well established both on principle and authority that when the existence of the policy at the time of the loss has been admitted and compliance therewith has been alleged, the burden of proving

affirmative matter constituting a special defense rests upon the insurance carrier. Aetna Ins. Co. v. Kennedy, 301 U. S. 389, at page 395, 57 S. Ct. 809, 81 L. Ed. 1177; Hartford Fire Ins. Co. v. Morris, 6 Cir., 27 F. 2d 508; Murdie v. Maryland Casualty Co., D. C. Nev., 52 F. 2d 888, appeal dismissed, 9 Cir., 57 F. 2d 1081; Kimball Ice Co. v. Hartford Fire Ins. Co., 4 Cir., 18 F. 2d 563, 52 A. L. R. 799. The burden of proving the special defense in the case at bar accordingly rests on the Lumbermen's Mutual Casualty Company."

Therefore under the rule that the burden of proof as to an exception is on the insurance company, and also under the rule that the burden of proof of a special defense is on them, the defendant in the instant case has the burden of proving that plaintiff was not in or upon the automobile at the time, and defendant has not sustained that burden.

K. Sufficiency of Evidence to Sustain Finding of Court That the Property Was Stolen From the Automobile When Plaintiff Was in the Automobile.

Court's Finding VII, in part states:

"That the plaintiff's jewelry and sample cases and trays were stolen from the trunk of plaintiff's automobile at a time when the plaintiff was in such vehicle." [T. R. p. 27.]

Assume for purposes of argument that the plaintiff does have the burden of proving that he was in the automobile at the time of the theft, we submit that we have sustained that burden.

We believe that by a fair interpretation of defendant's brief, it concedes that the property was in the automobile at the time of theft. Defendant states:

> "It is our position, that under clause 5(I) defendant merely had the burden of proving that the loss occurred while the jewelry was in the automobile." (Appellant's Op. Br. p. 16.)

> "Something must have happened to them and the most logical conclusion is indeed that which the trial court reached, namely, that someone stole them." (Appellant's Op. Br. p. 13.)

If defendant does not concede that, then it has not sustained even the burden that it claims it only has, and thus its whole argument falls.

There is no direct evidence that plaintiff or anyone else saw the property stolen from the trunk, while plaintiff was in the automobile. However the court, as a trier of the facts, has a right to indulge in inferences from the facts proved, in finding that the property was stolen from the trunk at a time when the plaintiff was in the vehicle. Inferences and circumstantial evidence form a sound basis for the finding.

In the case of *United States v. Fotopulos, et al.* (9th Cir., 1950, Cal.), 180 F. 2d 631, pages 634-635, *supra,* this court applied the foregoing rule, and aptly stated it, as follows:

Page 634:

> "The Federal Rules of Civil Procedure command us to sustain the findings of a trial judge, unless clearly erroneous. Rule 52, Federal Rules of Civil Procedure. The same norm governs cases arising under this statute. See, United States v. Chicago,

R. I. & P. Ry. Co., 10 Cir. 1948, 171 F. 2d 377, 379-380; Wasserman v. Perugini, 2 Cir., 1949, 173 F. 2d 305; Hubsch v. United States, 5 Cir., 1949, 174 F. 2d 7, 8; United States v. Uarte, 9 Cir., 1949, 175 F. 2d 110. This requires us to give due weight not only to conclusions drawn by the trier of facts from contradictory testimony, *but also to inferences made from testimony which does not stand contradicted directly, but the validity of which is impugned by other evidence in the record, or by legitimate inferences from admitted facts.* See Grace Bros. v. Commissioner, 9 Cir., 1949, 173 F. 2d 170; Pacific Portland Cement Company v. Food Machinery and Chemical Corporation, 9 Cir., 1949, 178 F. 2d 541."

Page 635:

"While he and the corporal testified that the Army truck struck the left rear corner of the deceased's truck, the contradiction in their testimony and the physical condition of the truck warranted inferences to the contrary."

Page 635:

"And the trial court, having made them, any attempt on the part of the appellate court to 'draw an inference of fact constitutes a "usurpation of the province of the trial court."' And this 'notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict.' Hamilton v. Pacific Electric Ry. Co., 1939, 12 Cal. 2d 598, 602-603, 86 P. 2d 829, 831. And see, Juchert v. California Water Service Co., 1940, 16 Cal. 2d 500, 507-508, 106 P. 2d 886; State of California v. Day, 1946, 76 Cal. App. 2d 536, 549, 173 P. 2d 399; Webster v. Board of Dental Examiners, 1941, 17 Cal. 2d 534, 539-540, 110 P. 2d 992; and

see, Grace Bros. v. Commissioner, 9 Cir., 1949, 173 F. 2d 170, 173-174, 177-178; Western Union Telegraph Co. v. Bromberg, 9 Cir., 1944, 143 F. 2d 288, 290-291."

The case of *Mah See v. North American Acc. Ins. Co.* (Cal., 1923), *supra,* 190 Cal. 421, 425, 426, 213 Pac. 42, 26 A. L. R. 123, the court announces and applies this rule, as follows:

Page 425 of Cal. Report:

"It is apparent from the evidence that the person who did the shooting was at the time aiming at Fong Wing. From this, either one of two conclusions could be drawn, either that the shooter knew and recognized Fong Wing and intended to shoot him, or that the shooter intended to shoot someone else and mistook Fong Wing for that other person."

Page 426 of Cal. Report:

"This court has frequently held that even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts, there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence (Anderson v. Los Angeles Transfer Co., 170 Cal. 66 (148 Pac. 212)). In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment (Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520 (153 Pac.

951); Hassell v. Bunge, 167 Cal. 365, 367 (139 Pac. 800)). 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' (Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547 (174 Pac. 44, 45).)"

You will notice that even though the evidence is uncontradicted, and two inferences can be fairly drawn from that evidence, the appellate court will not disturb the judgment if the trial court, trying the case without a jury, draws one or the other inference from that evidence. That is exactly the situation in the instant case.

While we contend that the uncontradicted evidence supports only the inference that the plaintiff was in the car at the time of the theft, let us assume for purposes of argument that the same uncontradicted evidence will support either of two inferences—one that the plaintiff was in the car, or the other that he was not in the car, at the time of theft. Still, if the court indulges in one of those inferences, the appellate court will not disturb the finding based on the inference it has drawn.

The premise is not subject to contradiction that plaintiff was either in the car or was not in the car at the time of the theft. Therefore, if it is conceded by the defendant (or proved by the plaintiff or defendant) that the property was in the car at the time of theft, and we have proved by direct uncontradicted evidence that property was *not* stolen from the car when plaintiff was *not* in the car, then it logically follows that only one other fact could possibly remain—that he was in the car at the time of the theft. Thus by direct evidence and logical

deduction we have sustained the burden that he was in the car at the time of the theft.

Because of the foregoing argument, we have gone into the evidence in as much detail in our Statement of the Case, as we did. We contend the evidence sufficiently and adequately proves that the theft *did not* occur while plaintiff was *not in the car,* because at all times when he was not in the car, he or someone else was watching the car. We believe this statement is supported by the evidence. It doesn't make any difference who was watching the car, the important thing is that it proves that *when he was not in* the car the property *was not stolen.*

At times the plaintiff was not actually in or upon the automobile, but at such times he was so close to it, and his vigilance in watching it so good, that for all practical purposes we can say that he was in or upon the automobile, even though he was not actually touching it with his hand or foot.

In the case of *Sierra Milling, Smelting & Mining Co. v. Hartford Fire Ins. Co.* (Cal., 1888), 76 Cal. 235, 18 Pac. 267, we have a similar situation and since a syllabus of that case briefly set forth the facts and holding pertinent to this question, we quote the same as follows:

Syllabus:

> "By a policy of fire insurance on a mill, the insured warranted that during all the time the mill remained idle it would employ a watchman to be in and upon the premises insured night and day. At the time of the fire, the watchman was on the premises connected with the mill, and a short distance from but not actually in the building, and was engaged in watching over the premises, and in a position where he had a better opportunity of seeing the

> property insured than if he had been in the mill building. Held, that the warranty had not been broken."

We believe it is a fair statement that when the court decided that case in 1888, the rules on interpretation were not as liberal as they are now. That case is particularly in point because the watchman though not actually in the building, was watching it and had a better opportunity of seeing the property insured. That is our situation here, because at such times as plaintiff was not in or upon the automobile, he was close to it and except for a minute or two when he was examining a diamond, he was always carefully watching it, and even while he was examining the diamond, someone else was watching it for him and the evidence supports the fact that the theft did not occur while he was examining the diamond. As a matter of fact the property received greater protection when he was watching, than if he was merely in the car when he was driving and not able to watch it as carefully.

The defendants rely strongly on the case of *Ruvelson v. St. Paul Fire & Marine Ins. Co.,* 235 Minn. 243, 50 N. W. 2d 629, but that case is distinguishable. At *page 631 of the Northwestern Reporter,* the Court quoted from the complaint, as follows:

> "He accordingly went to said Crookston Hotel and, having obtained the relief in which he had been in urgent need, returned to his car about two to four minutes later. During the period while he was in said hotel, certain persons or person unknown broke one of the windows in said car, opened the door from the inside thereof, and removed and stole the whole of said jewels and merchandise, property of the plaintiff."

As we read that case, we believe it is fair to say, that the salesman could not see the car from the place where he was having his coffee in the Hotel or using toilet facilities therein, nor was anyone watching it for him.

In that case it was definitely established that the theft *did* occur when he *was not* in the car. In the instant case the evidence supports the conclusion that the theft *did not* occur when the plaintiff *was not* in the car, and the conclusion that the theft *did* occur at a time when he *was* in the car.

L. Mysterious Disappearance.

The defendant's Fourth Defense in its answer is based on clause 5(M) of the insurance policy [Pltf. Ex. 1; T. R. pp. 15-16], which also is an exception, and we quote the pertinent portion thereof as follows:

> "* * * (M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory."

As to this exception, like all other exceptions, the same rules of construction and interpretation apply, and so also does the burden of proof.

Taking the sentence as a whole, it means that on taking inventory the unexplained loss or mysterious disappearance was disclosed. The rules on construction do permit the separation of the words "unexplained loss" or "mysterious disappearance" from "disclosed on taking inventory." The sentence must be taken as a whole and read together.

In the instant case, the disappearance was not disclosed on taking inventory, but was disclosed when the plaintiff opened the trunk of his automobile.

The construction placed upon this exception by the defendant, would render the whole policy a nullity, unless the plaintiff could affirmatively prove that the loss occurred by theft, robbery, burglary, fire, accident, or some other *known* cause. This is not a fair interpretation, especially when the policy provides:

> "5. This policy insures against *all risks* of loss of or damage to the above-described property arising from *any cause* whatsoever, except: * * *" [Pltf. Ex. 1.]

M. Inventory.

The defendant's Fifth Defense in its answer is based on the following provision of the insurance policy [Pltf. Ex. 1; T. R. pp. 16-17], which is:

> "8. It is a condition of this insurance that: (A) The assured will maintain a detailed and itemized inventory of his or their property and separate listing of all traveler's stocks, in such manner that the exact amount of loss can be accurately determined therefrom by the Company."

The defendant testified that he did have such an inventory, but that he could not find it, and that in the confusion following the theft he doesn't know what happened to it.

Under a stipulation entered into between counsel for plaintiff and defendant, after the loss occurred, the defendant had the right to have an accountant examine plaintiff's books and records and make photostatic copies as it saw fit, and the plaintiff testified that such an examination was made. As a matter of fact at the time examination was made, which was after the stipulation was made on March 17, 1956, they had the Proof of

Loss [Pltf. Ex. 2], in their possession, to which was attached a very detailed inventory of the items stolen.

There is not one word from the defendant that the inventory attached to the Proof of Loss is not correct. There is not one word from the defendant that the exact amount of loss could not be accurately determined from plaintiff's books and records that defendant examined. Therefore, defendant should not complain about the manner in which plaintiff kept his books and records. He was not required to keep a particular set of books and records. Whatever name you give it, he maintained what was required, and from it defendant could determine the loss, as therefrom plaintiff made up the detailed inventory attached to the Proof of Loss, and they do not complain about its accuracy.

"Insurance Law and Practice" by Appleman, Volume 5, page 99, Section 3024, states:

> "For the same reason that inventories are required, the insurer may require the insured carrying on a mercantile business to keep books so that the loss can readily be ascertained."

Appleman, in that section also states that the provision relating to keeping books constitutes a promissory warranty. We contend that the provision for keeping an inventory, coupled with the reason for keeping it—so that loss can be accurately determined—creates a promissory warranty.

Promissory warranties require substantial compliance only. Even if plaintiff had not kept the kind of inventory defendant wanted, that would not be material, since defendant does not claim that plaintiff did not suffer the loss, nor that the inventory attached to the Proof of Loss is

not accurate, nor that the books and records defendant examined did not support that inventory. In this connection the following cases are in point, page 283:

> "Provisions requiring the keeping of records and their production upon request for inspection by the insurer are promissory warranties. Substantial compliance with a promissory warranty is sufficient."
>
> *National Union Fire Ins. Co. v. California Cotton Credit Corp.* (9th Cir., 1935, Cal.), 76 F. 2d 279, 283.

Page 726 of 139 Atl.:

> "There is nothing before us in the case subjudice that tends to show that the keeping of books and accounts by the assured was material or would have been in the least helpful and necessary to accurately determine the loss of the assured, sustained by him as a result of the robbery. *No suggestion was made, on behalf of the appellant, that the assured did not suffer the loss claimed by him.*"
>
> *Michler v. New Amsterdam Casualty Co., Inc.* (S. Ct., N. J., 1928), 139 Atl. 725, p. 726, aff'd in 141 Atl. 920.

Therefore we contend that plaintiff has complied with this provision, and whether he has or has not, is not material because they do not complain about not being able to ascertain the loss or check on the loss as detailed by the plaintiff. Defendant does not claim plaintiff did not suffer the loss. As a matter of fact the total loss incurred by the plaintiff is greatly in excess of the coverage under the policy. The actual total loss to plaintiff was $26,274.51, but the insurance coverage was only $15,914.50 of that loss.

Conclusion.

Appellee respectfully submits that the findings of fact, conclusions of law and judgment are amply supported by the evidence and law, and that there were no errors occurring during the course of this trial which would require its reversal, and prays that the judgment be affirmed.

Respectfully submitted,

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